IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 10, 2007 Session

WANDA JO WADDELL COLE v. JOHN DUANE COLE

Appeal from the Chancery Court for Sumner County
No. 2003D-546 Tom E. Gray, Chancellor

No. M2006-00425-COA-R3-CV - Filed April 29, 2008

In this divorce action, Wife contends the trial court inequitably divided the parties' marital assets, and she also contends her award of alimony *in futuro* was insufficient. After thirty-four years of marriage to Husband, Wife filed a complaint for divorce. The trial court granted Wife a divorce on the grounds of Husband's adultery, divided the parties' limited marital assets, and awarded Wife alimony *in futuro* of $600 per month. Wife appeals asserting two issues. One, that the trial court erred by not including Husband's $310,000 life insurance policy as a marital asset. Two, that the court's award of alimony was insufficient. We have determined that the life insurance policy was not a marital asset because it had no cash value. We also find no error with the award of alimony *in futuro*. Therefore, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and JERRY SMITH, SP. J., joined.

James L. Curtis, Nashville, Tennessee, for the appellant, Wanda Jo Waddell Cole.

Karla C. Hewitt, Nashville, Tennessee, for the appellee, John Duane Cole.

OPINION

On November 7, 2003, Wanda Jo Waddell Cole ("Wife") filed a Complaint for divorce against John Duane Cole ("Husband") in the Chancery Court for Sumner County. They had been married since 1971, during which time they had two children, both of whom reached the age of majority prior to this action being filed.

During the first ten years of marriage, Husband was in the military, and the family lived on various military bases. Wife was primarily a homemaker and supplemented their income by selling real estate as a licensed agent. Upon discharge from the military, Husband accepted a position with the United States Postal Service, where he remained employed throughout the marriage.

In 1999, the United States Postal Service attempted to downsize and phase Husband out of his employment. Husband successfully challenged his termination in a federal lawsuit; however, he complained of problems upon his return to work. With hopes of retirement in the near future, Husband relocated to Denver, Colorado to complete his employment with the Postal Service. Husband told wife that he would complete his employment, retire and return to live with her in Tennessee.

Several months after relocating to Denver, Husband called Wife and left her a message indicating that he was not coming back and that he wanted a divorce. Unbeknownst to Wife, upon relocation, Husband moved into the Denver residence of his paramour, with whom he was involved in an intimate, adulterous relationship.

After learning of the affair, Wife filed a Complaint for divorce alleging, *inter alia*, adultery. Husband filed an Answer and Counter-Complaint, wherein, he admitted adultery. The court conducted a trial on the merits on May 24, 2005. On June 14, 2005, the trial court entered a Final Decree of Divorce, wherein it awarded Mother the divorce on grounds of adultery.

At the time of the divorce, the parties did not own any real property, and their assets were limited to Husband's thrift savings plan, United States Postal Service retirement plan, and two life insurance policies with death benefits of $10,000 and $310,000, respectively. Neither policy, however, had any cash value. The court divided Husband's retirement plans equally between the parties. It also ordered that Wife be named the beneficiary of Husband's $10,000 life insurance policy; however, Husband was awarded the $310,000 policy and the unilateral right to designate the beneficiaries. Wife was awarded alimony *in futuro* in the amount of $600 per month, and Husband was ordered to pay Wife's COBRA health insurance premiums for thirty-six months.

On appeal, Wife contends the trial court erred by awarding the $310,000 life insurance policy to Husband. She also contends the court awarded an insufficient amount of alimony in futuro. Wife also requests an award of attorney's fees on appeal.

DIVISION OF MARITAL ESTATE

Wife's legal argument that the trial court erred by awarding the $310,000 life insurance policy to Husband is set forth in her brief under the heading, "Did the trial court err in the Division of the Marital Property?" She contends the $310,000 life insurance policy is an asset, and thus, it must fit under one of the following categories: separate property, marital property, or a combination of the two. We find her argument is misplaced because there is no evidence in the record that the policy has any value; to the contrary, it was conceded that the life insurance policy has no cash value.

Tennessee is a "dual property" state. *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002), and an asset cannot be included in the marital estate unless it is "marital property." Thus, the division of the parties' marital estate begins with the classification of the property as marital property or separate property. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Property classification is a question of fact. *Mitts v. Mitts*, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000). Our

review of trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001).

"Marital property" is statutorily defined as being:

> [A]ll real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, . . . and valued as of a date as near as reasonably possible to the final divorce hearing date. . . . All marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property.

Tenn. Code Ann. § 36-4-121(b)(1)(A).[1]

"Separate property" is defined in Tenn. Code Ann. § 36-4-121(b)(2). As the statute clearly provides, separate property is not marital property, and thus, separate property should not be included in the marital estate. *Woods v. Woods*, No. M2002-01736-COA-R3-CV, 2005 WL 1651787, at *3 (Tenn. Ct. App. July 12, 2005).

Once property has been classified as marital property, the court should place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231; thus, such decisions are not second-guessed on appeal unless they are not supported by a preponderance of the evidence. *Smith*, 93 S.W.3d at 875.

The $310,000 life insurance policy at issue was provided to Husband as a benefit of his employment with the United States Postal Service. Most significant to the issue at hand, it is undisputed that the policy has no cash value. The trial court specifically noted that "there is no testimony the insurance policies have any cash value." At the conclusion of the trial, the trial court ruled that Husband could keep the policy.

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[1] Marital property also includes "income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage." Tenn. Code Ann. § 36-4-121(b)(1)(B). Furthermore, marital property includes "recovery in personal injury, workers' compensation, social security disability actions, and other similar actions for the following: wages lost during the marriage, reimbursement for medical bills incurred and paid with marital property, and property damage to marital property." Tenn. Code Ann. § 36-4-121(b)(1)(C).

This is not an issue of first impression. To the contrary, our courts had held that a life insurance policy that has no cash value is not "marital property." *See Bell v. Bell*, 896 S.W.2d 559, 562-65 (Tenn. Ct. App. 1994); *Wattenbarger v. Wattenbarger,* C/A No. 80, 1986 WL 6626, at *3-4 (Tenn. Ct. App. June 13, 1986); *Bartley v. Bartley*, No. 88-130-II, 1988 WL 136674, at *4 (Tenn. Ct. App. Dec. 21, 1988); *see Cozart v. Cozart*, No. 02A01-9810-CV-00285, 1999 WL 669225, at *4 (Tenn. Ct. App. Aug. 27, 1999); *see Melvin v. Johnson-Melvin*, No. M2004-02106-COA-R3-CV, 2006 WL 1132042, at *2 (Tenn. Ct. App. April 27, 2006).

Although it is undisputed that the policy had no "cash value," it is Wife's contention that the "value" of the insurance policy was the "expectancy" of being awarded the death benefit upon the Husband's death. Whether the value of an expectancy was a marital asset was at the center of the dispute in *Bell v. Bell*, 896 S.W.2d 559, 562-65 (Tenn. Ct. App. 1994). In that matter, this court held that the beneficiary of a life insurance policy without cash value merely possessed an expectancy, and that an expectancy was not marital property. The court explained that the beneficiary of a term life insurance policy has only "an expectancy in the proceeds prior to the death of the insured," and that a mere expectancy does not constitute marital property. *Id.* at 562. The court went on to state, "only the cash surrender value of the policies could be considered marital property." *Id.* at 563 (quoting *Lindsey v. Lindsey*, 342 Pa.Super. 72, 492 A.2d 396, 399 (1985); *see also Gleed v. Noon*, 415 Mass. 498, 614 N.E.2d 676 (1993); *Succession of Jackson*, 402 So.2d 753, 756-57 (La. App. 4th Cir.1981); *Metropolitan Life Ins. Co. v. Tallent*, 445 N.E.2d 990 (Ind.1983)). In *Wattenbarger v. Wattenbarger,* C/A No. 80, 1986 WL 6626, at *2 (Tenn. Ct. App. June 13, 1986), this court noted that there was proof the wife had purchased life insurance but "the record is devoid of any proof as to its value." Based upon the fact the insurance policy had no value, the court determined that the life insurance was not marital property. *Id.* at *3-4.

In the present case, both parties agree that the life insurance policy had no cash value, and that the only "value" of the policy was the mere expectancy of a death benefit.[2] Therefore, as *Bell* and *Wattenbarger* instruct, the $310,000 life insurance policy did not constitute marital property. Accordingly, we find no error with the trial court's decision to allow Husband to retain his life insurance policy.[3]

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[2] At oral argument, Husband's counsel answered affirmatively when asked whether the value of the insurance policy was the "expectancy" of being awarded the benefit in the event of Husband's death, and Wife's counsel answered affirmatively when asked if the life insurance policy was an asset *only* if Husband died.

[3] In the last paragraph of her argument under marital property, Wife also raises the argument that the award of the $10,000 life insurance policy was "not sufficient to guarantee the payment of the husband's alimony *in futuro* obligations." She, however, failed to cite to any authority or to specifically cite relevant evidence in the record to support this contention. Thus, she failed to comply with Tenn. R. App. P. 27(a)(7), which constitutes a waiver of the issue.

ALIMONY

The trial court awarded Wife alimony *in futuro* in the amount of $600 per month. Wife contends the award was insufficient.[4] We find no error with the award of alimony.

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). Therefore, appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682-683 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Alimony decisions require a careful balancing of the relevant statutory factors and typically hinge on the unique facts and circumstances of the case. *See Anderton*, 988 S.W.2d at 683; *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 625 (Tenn. Ct. App. 1994).

In determining whether an award of spousal support and maintenance is appropriate, and if so, in determining the nature, amount, length of term, and manner of payment, the courts are to consider all relevant factors. The factors the Tennessee General Assembly identified for consideration are stated in Tenn. Code Ann. § 36-5-121(i) (formerly Tenn. Code Ann. § 36-5-101(d)). Those factors are:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
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> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
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> (3) The duration of the marriage;
>
> (4) The age and mental condition of each party;
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> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

[4] In his brief, Husband argued that Wife should have been awarded rehabilitative alimony, not alimony *in futuro*; however, at oral argument, it was conceded that Wife was an appropriate candidate for alimony *in futuro*.

> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
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> (7) The separate assets of each party, both real and personal, tangible and intangible;
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> (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
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> (9) The standard of living of the parties established during the marriage;
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> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
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> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
>
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i). Of the foregoing factors, our courts have identified two as the most important, the need of the disadvantaged spouse and the obligor's ability to pay. *Varley v. Varley*, 934 S.W.2d 659, 668 (Tenn. Ct. App. 1996). After considering the factors relevant to a particular case, the court may award alimony to be paid by one spouse to or for the benefit of the other "according to the nature of the case and the circumstances of the parties." Tenn. Code Ann. § 36-5-121(a).

Alimony *in futuro* "is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient." Tenn. Code Ann. § 36-5-121(f)(1).

> Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(f)(1). An award of alimony *in futuro* remains in the trial court's control for the duration of the award, and "may be increased, decreased, terminated, extended, or otherwise

modified, upon a showing of substantial and material change in circumstances." Tenn. Code Ann. § 36-5-121(f)(2)(A).

With the foregoing legal principles and factors in mind, we will now examine the relevant facts of this case. The relative income of the parties was significantly disproportionate as of the date of trial. According to Wife's income and expense statement, she earned a net monthly take home pay of $932, while her expenses totaled $2,385, leaving her with a significant claimed deficiency on a monthly basis. Husband had net take-home earnings of $3,358 per month. His expenses totaled $3,482, leaving him with a claimed deficiency of $124 per month.

Throughout the parties' thirty-four year marriage, Wife was primarily a homemaker. She completed a high school education but never obtained any further degree. To supplement the parties' income during their marriage, she obtained her real estate license in 1984. Although at the time of trial Wife took home $932 per month, she testified that she had made as much as $28,000 in a previous year. Furthermore, prior to the divorce, Wife underwent colon surgery, which resulted in complications and further surgery. At trial, Wife testified that her health was much better, but she was still weak and anemic. Husband was employed throughout the marriage, and while he was in the military he attended college and obtained a bachelor's degree.

It is evident that the parties' financial status is less than sound. Both parties have a negative income on a monthly basis after paying their expenses. Husband has a greater income and a college degree, but Wife also has skills and tools, most significantly her real estate license, which affords her the opportunity to maintain employment. Moreover, her health has been improving, although the parties disagree to what extent.

In the Final Decree of Divorce, the trial court stated that it had looked at "the income and expense statements of both parties. There is a need on the part of the wife for financial support, and the husband does have the ability to pay." As a consequence the court awarded Wife alimony *in futuro*, and in addition thereto, she received a significant economic benefit in the form of thirty-six months of COBRA insurance. The record reveals that the premiums for her COBRA insurance were $401 per month, which constitutes an economic benefit to Wife and, thus, reduces her financial need. *See Kemp v. Kemp*, No. 88-175-II, 1988 WL 116368, at *3 (Tenn. Ct. App. Nov. 2, 1988) (holding that the receipt of COBRA benefits constitutes a form of alimony). Because the insurance payments were for a fixed term, thirty-six months, that award is not considered alimony *in futuro*, but it constitutes financial support, and a form of alimony, which we find significant to the issue of alimony *in futuro*.

We are mindful of the fact that the COBRA benefit will expire in thirty-six months, leaving Wife with a substantial economic deficit if she fails to gain meaningful employment by that time. That unfortunate circumstance, should it occur, can be considered by the trial court at that time because an award of alimony *in futuro* is subject to modification in the future. *See* Tenn. Code Ann. § 36-5-121(f)(2)(A) (stating "[a]n award of alimony in futuro shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances").

Considering the relevant factors and circumstances of this case, including the COBRA benefit Wife presently receives, we find no error with the award of $600 per month of alimony *in futuro*.

ATTORNEY'S FEES ON APPEAL

For her final issue, Wife has asked that she be allowed to recover the cost of her attorney's fees on appeal. We have determined she is not entitled to recover her attorney's fees on appeal due to the fact she did not prevail on any of the issues she presented.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Wanda Jo Waddell Cole.

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FRANK G. CLEMENT, JR., JUDGE